18-1589(L)

18-1910(XAP)

To Be Argued By:
MICHAEL D. LOCKARD

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket Nos. 18-1589(L), 18-1910(XAP)

UNITED STATES OF AMERICA,

Appellee,

—v.—

MEHMET HAKAN ATILLA,

Defendant-Appellant,

REZA ZARRAB, also known as Riza Sarraf, CAMELIA JAMSHIDY, also known as Kamelia Jamshidy, HOSSEIN NAJAFZADEH, MOHAMMAD ZARRAB, also known as Can Sarraf, also known as Kartalmsd, MEHMET ZAFER CAGLAYAN, also known as Abi, SULEYMAN ASLAN, LEVENT BALKAN, ABDULLAH HAPPANI,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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[1] The Government filed a timely notice of cross-appeal but is filing today a stipulation withdrawing that notice.

Preliminary Statement

Mehmet Hakan Atilla appeals from a judgment of conviction entered on May 16, 2018, in the United States District Court for the Southern District of New York, following a six-week jury trial before the Honorable Richard M. Berman, United States District Judge, and a jury.

Superseding Indictment S4 15 Cr. 867 (RMB) (the "Indictment") was filed on September 9, 2017, in six counts. Count One charged Atilla with conspiring to obstruct the lawful functions of the U.S. Department of the Treasury, in violation of 18 U.S.C. § 371. Count Two charged Atilla with conspiring to violate the International Emergency Economic Powers Act ("IEEPA"), in violation of 50 U.S.C. § 1705. Count Three charged Atilla with bank fraud, in violation of 18 U.S.C. § 1344. Count Four charged Atilla with conspiring to commit bank fraud, in violation of 18 U.S.C. § 1349. Count Five charged Atilla with money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A). Count Six charged Atilla with conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h).

Trial commenced on November 27, 2017, and ended on January 3, 2018, when Atilla was convicted on Counts One, Two, Three, Four and Six.

On May 16, 2018, Judge Berman sentenced Atilla to a term of 32 months' imprisonment and imposed a $500 mandatory special assessment.

Atilla is serving his sentence.

Statement of Facts

The charges against Atilla arose out of his participation in the largest known scheme to evade Iranian financial sanctions—a scheme to launder billions of dollars' worth of Iranian oil proceeds out of the Turkish bank where Atilla worked. As the Deputy General Manager for International Banking, Atilla was responsible for, among other things, the bank's relationships with U.S. correspondent banks, Iranian banks, and the Central Bank of Iran ("CBI"), and for the bank's international corporate finance efforts. The scheme fueled a dark pool of Iranian government-controlled funds that could be clandestinely sent anywhere in the world—including enormous sums of money laundered through the U.S. financial system.

Atilla's bank, Türkiye Halk Bankaşi, A.S. ("Halkbank"), held accounts for the CBI and Iran's government-owned petroleum company, the National Iranian Oil Company ("NIOC"), and as a result was the principal financial channel for trade between Turkey and Iran. Atilla worked with others at Halkbank to help its customers design gold shipments and fictitious food sales using NIOC's oil funds in order to disguise billions of dollars' worth of illicit finance for the Government of Iran as permissible private trade and humanitarian assistance. Because the U.S. Department of the Treasury ("Treasury") could impose sanctions on Halkbank for this scheme, dealing the bank a mortal blow by cutting it off from the U.S. financial system, Atilla repeatedly lied to senior Treasury officials to protect the scheme and his bank.

Over several weeks of trial, the Government presented overwhelming evidence of Atilla's guilt, including:

> (1) testimony from a cooperating witness, Reza Zarrab, who was one of Atilla's coconspirators;
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> (2) emails from accounts used by Zarrab and his employees and business associates;
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> (3) correspondent account transfer records from U.S. financial institutions concerning Zarrab's companies and affiliated entities;
>
> (4) electronic records recovered from Zarrab' s phone;
>
> (5) evidence from a Turkish criminal investigation of Atilla, Zarrab, other Halkbank officers, and Turkish government officials for corruption and money laundering offenses, including (i) wiretaps and transcripts of wiretaps of calls involving Zarrab, Atilla, and others; (ii) electronic records recovered from Zarrab's phones; (iii) records from computers and electronic devices seized during searches of Zarrab's and his associates' offices and a Halkbank office; and (iv) photographs of documents seized during the office searches; and

> (6) documents and witness testimony from Treasury regarding its communications with Atilla and others at Halkbank.

A. The Government's Case

1. Zarrab's Corrupt Relationship with Halkbank

In 2012, Zarrab, a famous Turkish-Iranian businessman living in Istanbul with high-level experience helping the CBI and other Iranian banks to evade sanctions (Tr. 279-95), approached Halkbank about using Iranian oil revenues held at Halkbank for gold transactions. (Tr. 296).[2] Zarrab knew that Halkbank held huge amounts of Iranian oil funds and wanted to supply his illicit finance services to the Government of Iran to free these funds from sanctions restrictions. Through his prior illicit finance experience, Zarrab already had relationships with both the CBI and NIOC (Tr. 279-80, 216-17).

Zarrab first approached Halkbank's then-general manager (the bank's top executive officer), Suleyman Aslan, in about March 2012. (Tr. 299). At that time, Halkbank was working with a business associate of Zarrab's to facilitate the use of Iranian oil proceeds to buy and export gold, and Zarrab proposed to engage in

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[2] "Tr." refers to the trial transcript; "Br." refers to Atilla's brief on appeal; "A." refers to the appendix filed with that brief; "SA" refers to the supplemental appendix filed with the Government's brief; and "Dkt." refers to an entry on the District Court's docket for this case.

the same business. (Tr. 297-301). Aslan rejected Zarrab's proposal due to concern that attention would be drawn to the scheme and to Halkbank because of Zarrab's notoriety. (Tr. 299). Zarrab turned to then-Minister of the Economy for Turkey, Zafer Mehmet Cağlayan, to overcome Aslan's resistance. Zarrab explained his proposed business: Zarrab's companies would use Iranian oil funds to buy gold in Turkey and export it to Dubai, where it could be re-sold and the proceeds used to make international payments for the Government of Iran. Cağlayan agreed to exercise his influence on Zarrab's behalf in exchange for 50% of Zarrab's profits. (Tr. 299-302). At Zarrab's next meeting with Aslan, Cağlayan's influence prevailed and Halkbank agreed to work with Zarrab. (Tr. 309-10).

A few months later, Aslan also asked to be compensated for the risks he and Halkbank were taking by participating in the scheme. As discussed more fully below, Treasury officials—in particular at that time, then-Under Secretary of Terrorism and Financial Intelligence, David S. Cohen, and then-Director of OFAC, Adam Szubin—had been meeting with Aslan and Atilla throughout 2012 to educate them about escalating U.S. sanctions against Iran and Iranian efforts to evade those sanctions, to encourage Halkbank's compliance, and to gather information about Halkbank's activities and compliance efforts. (Tr. 1079-90, 1100-23). Shortly after one meeting in September 2012 that involved "a relatively lengthy conversation about the fact that Iran clearly continued to want to acquire gold," and Atilla's assurances to Treasury that "they understood that and would do everything they could to prevent it" (Tr. 1121-22), Aslan

asked to meet with Zarrab. Aslan complained that, while Cağlayan was the one giving instructions, Aslan was the one taking the risks in his dealings with U.S. government officials. (Tr. 408-09). Zarrab secured Cağlayan's consent to bribe Aslan, and then started sending cash deliveries to Aslan's residence. (Tr. 409-14).

2. The Gold Method

The first method that Atilla, Aslan, Zarrab, and others at Halkbank used to free NIOC's oil revenues from Halkbank was through gold exports.

The proceeds of Iran's sales of oil and natural gas to Turkey were first transferred between bank accounts within Halkbank, moving from the CBI's or NIOC's accounts to intermediary accounts held by one of several Iranian banks involved in the scheme, and then to Zarrab's companies' accounts. Zarrab used this money to buy gold, either paying for the gold directly from his companies' Halkbank accounts or first transferring the funds to accounts that his companies held at other banks in Turkey, and then paying for the gold out of those accounts. (Tr. 324-31; A. 955).

The ostensible purpose of these gold transactions was to export the gold from Turkey to private jewelers in Iran via Dubai. (Tr. 332; SA 13). At the time, these gold shipments would be permissible under U.S. law if the gold was not directly or indirectly for the Government of Iran and the transactions did not involve wires through the United States. (Tr. 125-26). But the purpose of the exports was, in fact, to benefit NIOC, an arm of the Government of Iran (Tr. 102, 168-69), by

freeing Iran and its oil revenues from the restrictive effects of U.S. sanctions. (*Compare* Tr. 319-23; SA 94, *with* Tr. 323-35; A. 955).

The gold's purported transit to Iran was reflected in customs documents and invoices, but the gold never reached Iran. (Tr. 332). Instead, it was sold in Dubai for U.A.E. dirhams. (Tr. 332-33). The destination of the gold exports reflected in documents was chosen based on instructions from Atilla and Aslan (Tr. 356-57): the documents initially reflected that the destination was Iran, but in response to changes in the U.S. sanctions laws (Tr. 125), Atilla and Aslan instructed Zarrab in August 2012 to change the destination on the paperwork to Dubai. (Tr. 689-90; *see also, e.g.*, SA 50-84). In February 2013, after another change in the U.S. sanctions laws (Tr. 127-29), Atilla directed Zarrab to change to paperwork to "Iran via Dubai" in order to appear to comply with the revised sanctions requirements. (Tr. 359-63, 691-93; SA 2-3, 50-84).

After the gold was sold in Dubai, proceeds were exchanged to other currencies as necessary so they could be sent anywhere in the world based on instructions conveyed by the intermediary Iranian banks. (Tr. 333). This included payments in U.S. dollars. (Tr. 404-05, 566-67, 715-20). Thus, NIOC and Iranian banks that were cut off from access to the U.S. financial system because of U.S. sanctions had a clandestine pool of currency that could be used freely, including by directing transactions through U.S. banks that otherwise would have been blocked. (Tr. 104). At the same time, Halkbank attempted to insulate itself from being sanc-

tioned by pretending that it was not facilitating financial transactions with Iranian oil proceeds at the behest of Iranian government-controlled entities, and that the gold shipments were merely for private companies and jewelers in Iran. (Tr. 332, 1133-34, 1214-16, 1446; *see also* SA 13).

The system was so effective that NIOC and the CBI made persistent efforts to transfer oil reserves held in other countries to Halkbank so that these funds could also be fed into the system. For example, in October 2012, Atilla, along with Aslan and others at Halkbank, met with officials from NIOC and NIOC's foreign subsidiary, the Naftiran Intertrade Company ("NICO"); with Zarrab; and with an official from the Iranian bank Sarmayeh to discuss several topics, including NIOC's interest in moving its oil proceeds held in India to Halkbank. (Tr. 395-96).

NIOC and the CBI also attempted to save on the expense of Zarrab's commissions by asking Halkbank to conduct their international payments directly. At the same October 2012 meeting described above (involving Atilla, Aslan, NIOC officials, NICO officials, Zarrab and Bank Sarmayeh), Atilla and Aslan rejected this proposal, telling NIOC and NICO that there was no need for Halkbank to conduct Iran's international payments because Zarrab already was doing them. (Tr. 395-97). Iran repeated this request at another meeting a few days later with officials from Iran's Oil Ministry and the CBI, and Aslan denied it again for the same reason. (Tr. 425-29).

3. The Fake Food Method

The escalating sanctions that led Atilla to instruct Zarrab in February 2013 to change the documented destination of gold shipments from Dubai to Iran through Dubai, also caused Aslan to instruct Zarrab to turn to another method altogether to evade sanctions: using Iran's oil funds for purported "humanitarian trade" using fake documents. (Tr. 492-501). As both Atilla and Aslan knew from their meetings with Treasury officials, this would be nominally exempt from most of the Iran sanctions. (Tr. 1089-90, 1115-16). Halkbank already facilitated real food sales to Iran for other companies, including international agribusinesses like Cargill and Bunge. (Tr. 655). Zarrab, on the other hand, apart from some tea trade as a teenager, had never been involved in international food trade. (Tr. 271, 494).

Over the next few months, Zarrab established the companies and assembled the documents needed for the fake business, including forged customs records. (Tr. 505-08, 577-85). Preparing for a test transaction in April 2013, Zarrab spoke with Atilla and other senior Halkbank officials. (Tr. 503-08). At that point, though Atilla was a co-conspirator in the gold scheme, he was not yet aware that the purported humanitarian trade would be entirely fictional; Atilla noted significant differences between Zarrab's proposal and how Halkbank's other humanitarian trade transactions worked, and doubted the plausibility of the scheme, stating that he thought it "a bit of a strange structure." (Tr. 505-08; A. 863-69).

Atilla raised his reservations about the implausibility of Zarrab's food scheme within Halkbank (Tr. 511-12), but Aslan quickly instructed him to continue with the transactions. (Tr. 512). In a series of email exchanges, Atilla altered the bank's typical document requirements to match what Zarrab was able to supply or forge. (SA 95-99; *see also* SA 9-10). Zarrab, for example, was excused from providing bills of lading —which, as Atilla pointed out when Zarrab first suggested he could supply them, were traceable by the shipping company (Tr. 570-71) and therefore forgeries could be detected.[3] Atilla, Aslan, and Zarrab met together to go over the scheme and to adjust its mechanics to protect the scheme and Halkbank from detection. (Tr. 558-73).

As ultimately constructed, the food system worked similarly to the gold system, modified to match the purported nature of the sham transactions. Even the purported buyers were largely overlapping—Iranian banks that claimed to import gold to Iran now claimed to buy food. (Tr. 561, 765-76). As in the gold system, NIOC or the CBI first transferred funds from their accounts at Halkbank to an intermediary Iranian bank's account at Halkbank. (Tr. 560-61). As in the gold system, the intermediary Iranian bank would then trans-

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[3] To explain the absence of bills of lading, Zarrab pretended that small wooden boats, too small to provide bills of lading, would move hundreds of tons of food and agricultural products across the Persian Gulf from Dubai to Iran. (Tr. 579-80).

fer the funds to the account of one of Zarrab's companies, also at Halkbank, such as a company called "Volgam," which purported to be a food broker. (Tr. 562). Volgam transferred the money to yet another one of Zarrab's company's accounts at Halkbank, such as a company called "Centrica" or "Atlantis Capital General Trading." (Tr. 562-64). Centrica and Atlantis purported to be food sellers based in Dubai; at Atilla's suggestion, Zarrab first transferred the funds from Volgam to Centrica or Atlantis within Halkbank to attenuate the funds' connection with Iran before the funds left Halkbank and so that Centrica or Atlantis' intracompany transfers of the funds from their accounts at Halkbank to their accounts in Dubai would attract less bank scrutiny. (Tr. 565-66, 569-70). Once the oil proceeds were in the Dubai bank accounts of Centrica or Atlantis, the intermediary Iranian banks would convey instructions to execute international transfers with the money, including U.S. dollar transfers that went through U.S. correspondent accounts. (Tr. 566-67).

When Atilla, Aslan, and Zarrab implemented the food method in earnest in July 2013, Atilla quickly discovered flaws in the scheme's execution. In a series of intercepted calls, Atilla coached Zarrab on correcting patent errors in the fake documentation that put the scheme, and Halkbank, at risk. In a July 2, 2013 call, Atilla cautioned Zarrab about the size of the transactions: the paperwork, in order to make the food volume match the amount of money being moved, implausibly purported that 150 thousand tons of wheat was being shipped using 5- and 10-thousand ton ships. (Tr. 1643-44). Atilla also cautioned Zarrab to list a plausible

origin of the food, reminding him that "wheat doesn't grow in Dubai." (Tr. 658-59, 1643-44).

A few days later, Atilla again corrected Zarrab, this time about the sizes of the ships on the documents and the way the shipments were being divided up. (Tr. 661-62, 664-68). First, Atilla reminded Zarrab not to claim to use ships large enough to supply bills of lading, because "the Bill of Lading may be somewhat doable, you know, with the large vessels." (A. 859; *see also* Tr. 664-66). Second, Atilla told Zarrab to make sure the listed food quantities weren't larger than the capacities of the ships he claimed to use: "vessels with capacities between thirteen thousand and fourteen thousand tons; when their loads are twenty thousand, then that . . . becomes different and odd. . . . You get that—that reviewed, you know, there are those large loads on small tonnage ones." (A. 859; *see also* Tr. 667; SA 34). When Zarrab conveyed the conversation to his office manager, he summarized Atilla's warnings succinctly: "don't stick it in our eyes," and beware of sinking the ships. (Tr. 1654).

4. Atilla's Lies to Treasury to Protect the Scheme and His Bank

In addition to lending his expertise to the design of the scheme, Atilla also lied to senior Treasury officials to protect the scheme and to avoid his bank being sanctioned. In a series of meetings, phone calls, and emails over the course of more than two years, Atilla and his co-conspirators at the bank concealed the true nature of the scheme to channel NIOC's oil proceeds through

gold and fictitious food trade with Zarrab and his network of companies.

Atilla and Aslan met with Under Secretary Cohen and OFAC Director Szubin in Washington, D.C., in March 2012, around the same time that Halkbank started working with Zarrab to execute the gold method to channel NIOC's oil proceeds. Treasury emphasized recent U.S. sanctions imposing requirements on foreign banks conducting transactions involving the CBI and Iranian oil revenues.[4] Atilla and Aslan repre-

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[4] Section 1245 of the National Defense Authorization Act of 2012 ("2012 NDAA"), Pub. L. No. 112-81, 125 Stat. 1298, 1647 (Dec. 31, 2011) (codified at 22 U.S.C. § 8513a), required the imposition of sanctions against foreign financial institutions conducting significant transactions with the CBI or other designated Iranian banks, unless (a) the country where the foreign financial institution was located significantly reduced its purchases of Iranian oil every 180 days, or (b) the transactions were for humanitarian trade. 2012 NDAA § 1245(d)(l)(A), (d)(2), (d)(4)(D). With respect to foreign central banks and banks owned or controlled by foreign governments, the sanctions applied only to the purchase or sale of petroleum products to or from Iran. § 1245(d)(3). The sanctions that were to be imposed against foreign financial institutions included prohibiting or restricting U.S. correspondent accounts. § 1245(a)(l)(A). In February 2012, OFAC implemented the 2012 NDAA provisions in the Iranian Financial Sanctions Regulations, 31 C.F.R. Part 561 (the

sented that Halkbank was "not allowing Iran to acquire gold or bank notes from Halkbank, using the proceeds that Halkbank was holding for Iran from the sale of oil." (Tr. 1117). Treasury discussed Iranian sanctions evasion efforts and techniques, and Atilla and Aslan assured that they "understood that, that Iran would look to use deceptive practices to evade sanctions" and that "they had mechanisms in place at the bank to ensure that they would detect and prevent Iranian efforts to evade the sanctions." (Tr. 1117-18; 1418-20).

Under Secretary Cohen and other Treasury officials met again with Atilla in Turkey on September 4, 2012. Following the March 2012 meeting in Washington, a July 30, 2012 executive order had (1) implemented and expanded the provisions of the 2012 NDAA pursuant to the IEEPA and (2) authorized the imposition of sanctions, including prohibiting opening or maintaining a U.S. correspondent account, against foreign banks that facilitated the sale or supply of gold directly or indirectly to the Government of Iran. *See* Exec. Order 13622, §§ 1, 5; 77 Fed. Reg. 45,896 (Jul. 30, 2012). In addition, an August 2012 law amended

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"IFSR"). *See* 77 Fed. Reg. 11,724 (Feb. 27, 2012). As discussed further below, in July 2012 these provisions would be expanded and further implemented pursuant to the IEEPA. *See* Exec. Order 13622, §§ 1, 9; 77 Fed. Reg. 45,896 (Jul. 30, 2012).

the 2012 NDAA to narrow the scope of permissible foreign trade involving Iranian oil proceeds.[5] Despite the fact that Atilla and other senior officers at Halkbank were knowing participants in the gold method of evading sanctions with Zarrab and NIOC, Atilla represented to Treasury officials that the bank strongly intended to avoid violating U.S. sanctions and expressed a willingness to suspend business with any entity that Treasury identified as engaging in concerning activities. Atilla represented that the bank insisted on extremely careful due diligence, demanding documents

[5] *See* Iran Threat Reduction and Syria Human Rights Act of 2012 ("TRA"), § 504, Pub. L. No. 112-158, 126 Stat. 1214, 1261 (Aug. 10, 2012) (codified at 22 U.S.C. § 8513a). Under the TRA, a foreign bank facilitating the purchase or sale of oil products to or from Iran would be sanctioned unless it (1) credited Iran's proceeds to an account held in the foreign country, and (2) allowed those funds to be used only for (a) bilateral trade, that is, trade in goods or services between that foreign country and Iran, or (b) humanitarian trade. *See* 22 U.S.C. § 8513a(d)(2), (d)(4)(D). This requirement became effective 180 days after the statute's enactment, in February 2013. OFAC implemented the TRA through the IFSR in November 2012, *see* 77 Fed. Reg. 66,918 (Nov. 8, 2012), and in June 2013 the provisions of the TRA were implemented and expanded pursuant to the President's authority under the IEEPA. Exec. Order 13645, §§ 3, 9; 78 Fed. Reg. 33,945 (June 3, 2013).

to understand every part of a transaction and the relationship between commercial entities in order to minimize the risk they would be unwittingly involved in financing sanctioned activities. Under Secretary Cohen cautioned Atilla that some non-government Iranian banks might be abusing their access to Halkbank in order to facilitate proliferation-related transactions, and that Turkish trading firms might have used accounts in Turkish banks to help designated Iranian entities transfer money abroad. Atilla disclosed that the CBI had approached the bank approximately a year earlier to facilitate gold acquisition, but he mentioned nothing about the ongoing gold scheme with Zarrab and NIOC. Under Secretary Cohen warned that Iran would likely not use the CBI directly, or any apparent Iranian entity, to acquire gold and would seek to shroud its involvement, and emphasized the need for Halkbank to distinguish between individuals purchasing gold and entities acting on behalf of the Iranian government. (Tr. 1118-23; *see also* A. 892-93).

Thus, at this meeting, Atilla concealed material information about Halkbank's role in facilitating the use of NIOC funds to buy gold for export to Dubai and actively misled Treasury about the bank's due diligence and compliance efforts. Halkbank was involved in precisely the conduct that Under Secretary Cohen warned about. Atilla also actively misled Treasury by expressing Halkbank's purported commitment to sanctions compliance and its willingness to cut off business with entities specifically identified by Treasury, an approach apparently calibrated to serve as an excuse for continuing business with any entities (like Zarrab's) unless specifically warned by Treasury. Atilla also

trumpeted Halkbank's "extremely careful" due diligence and demand for documents concerning transactions and commercial parties for the purpose of avoiding involvement in sanctioned activities, while the bank in fact was secretly facilitating the export of gold to Dubai using Iranian oil funds channeled through intermediaries so that the Government of Iran and Iranian entities would have access to the funds. (*Id.*).

In November 2012, Under Secretary Cohen had a follow-up telephone call with Atilla's coconspirator, Aslan, to reemphasize the gold and bilateral trade sanctions. Under Secretary Cohen cautioned Aslan that, because other banks were exiting the Iran business, Halkbank was becoming an even more important conduit for Iran, further increasing the risk of Iranian sanctions evasion through the bank. Aslan raised the topic of gold and justified Halkbank's business on the ground that Turkey was the world's second-largest gold refiner, and that Halkbank had many clients that sold gold, including to Iran, but represented that these clients did not sell to the Government of Iran. (Tr. 1123-29).

Shortly after this call, the press reported statements by the Turkish Deputy Prime Minister that, essentially, described the gold scheme at Halkbank. Under Secretary Cohen sent a letter to Aslan on December 20, 2012, warning that facilitating Iran's purchase or acquisition of gold subjected the bank to being sanctioned. (SA 85-87; *see also* Tr. 1129-31). Atilla and Aslan both responded by claiming, in meetings with Under Secretary Cohen and with OFAC Director Szubin, that Halkbank facilitated gold exports only to

private Iranian citizens, such as jewelers. (Tr. 1133-34, 1214-16, 1446; *see also* SA 13). Atilla never disclosed that Iranian banks or companies controlled by Iranian banks were the purported importers of the gold, which would have raised red flags with Treasury. (Tr. 1152-53, 1363-64).

Atilla met with Treasury officials in two meetings in Turkey in February 2013: first with OFAC Director Szubin and his team on February 13, 2013, and second with Under Secretary Cohen and his team on February 28, 2013. The meetings addressed two significant developments in the escalating sanctions against the Government of Iran: first, the "bilateral trade" requirements for the use of Iranian oil proceeds, imposed as part of the TRA (*see supra* at 14 n.4), took effect on February 6, 2013; second, the restrictions on the supply of gold to Iran were tightened in an attempt to prevent the Government of Iran from using cutouts to conceal its involvement in gold transactions.[6] (Tr. 1131-

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[6] *See* Iran Freedom and Counter-Proliferation Act ("IFCA"), Subtitle D of Title XII of the National Defense Authorization Act of 2013. Pub. L. No. 112-239, §1245, 126 Stat. 1632, 2009 (Jan. 2, 2013). The IFCA required the imposition of sanctions against any person determined to sell, supply, or transfer, directly or indirectly, precious metals to or from Iran and required prohibiting or restricting U.S. correspondent accounts for any foreign bank determined to have conducted or facilitated a significant financial transaction for the sale, supply, or transfer of precious metals to or

32, 1365-66, 1415). The meetings also addressed Iranian efforts to evade the sanctions and Halkbank's efforts to comply and to prevent evasion efforts. (Tr. 1423-32; A. 887-89). In the first meeting, Director Szubin described a recent example of large-scale Iranian sanctions evasion through a South Korean bank that involved fake companies and fake documents; in response, Atilla represented that Halkbank had strong due diligence procedures and document demands to prevent evasion and refused to do business with anyone having less than five years' export experience. (Tr. 1430-31). Only days earlier, Aslan had instructed Zarrab—with no relevant history in the food or medicine trade—to start channelizing NIOC's oil proceeds with food and medicine trade. (Tr. 492-95; SA 18).

Referring to gold transactions, Atilla watered down the bank's prior representations about the strength of its due diligence, now claiming that Halkbank had a hard time knowing the origin and destination of the trades. (A. 888). Atilla, however, was well-versed in the purpose and transaction flow of Zarrab's and NIOC's gold trade—and, indeed, a few days after this meeting, Atilla would expressly instruct Zarrab to change the purported destination on the gold documentation from Dubai to "Iran via Dubai." (*See supra* at 8). Director Szubin warned that the Government of

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from Iran. The provisions went into effect 180 days after passage. These restrictions were implemented and expanded pursuant to the IEEPA in a June 3, 2013, executive order. Exec. Order 13645, §§ 7, 9; 78 Fed. Reg. 33,945 (June 3, 2013).

Iran might be the ultimate purchaser and Halkbank should be extremely careful. (A. 888). Due to its concern about Halkbank's possible involvement in evasion, Director Szubin arranged for a one-on-one conversation with Atilla to warn that, while Halkbank may view its discussions with Treasury as routine, Treasury did not: Treasury did not have comparable engagement with any other bank and viewed Halkbank in its own category. The discussion caused Atilla to break into a sweat. (Tr. 1435-37).

On February 28, 2013, Under Secretary Cohen met with Atilla and Aslan. (Tr. 1131-41; A. 897-99). Under Secretary Cohen again raised the example of Iranian sanctions evasion through South Korean banks, as part of a discussion about Iran's ongoing evasion efforts. Atilla and Aslan told Under Secretary Cohen, among other things, that the bank was not in the business of ensuring the Government of Iran access to its profits—which, of course, was exactly what they were doing through the gold and food methods. Under Secretary Cohen raised the gold trade again, warning that Treasury would be intolerant of any issues in the future. Atilla and Aslan assured that Halkbank would comply with all U.S. sanctions, and that Halkbank would stop facilitating any gold exports by June 2013. Atilla and Aslan also said that the volume of gold transactions was decreasing and that most of the activity involving the CBI oil and gas accounts involved humanitarian trade. Atilla and Aslan represented that the bank's due diligence was rigorous, however, and that it only permitted large, well-established companies (unlike Zarrab) to transact through the bank. (Tr.1131-41).

On March 15, 2013, Director Szubin sent Atilla and Aslan a letter summarizing, in part, the discussions he and Under Secretary Cohen had in their respective February meetings. (Tr. 1433-35; SA 88-90). The cover email referred to Treasury's recent imposition of sanctions against a Greek shipping magnate who had supplied services to Iran's oil and shipping industries through front companies. The action was brought to Atilla's and Aslan's attention in part to demonstrate Treasury's seriousness about enforcing sanctions and willingness to take action. (Tr. 1435).

On July 1, 2013, Atilla emailed Under Secretary Cohen and Director Szubin separately, representing that Halkbank had stopped facilitating payments for gold exports as of June 10, 2013. On June 3, 2013, an executive order had issued implementing and broadening the gold sanctions (effective July 1, 2013) and the bilateral trade sanctions. (*See supra* at 14 n.4, 16 n.5). According to Halkbank's internal records of gold exports by Zarrab's companies and records maintained by Zarrab's companies, Zarrab exported gold to Dubai for Iran through at least December 2013, with between 9 and 10 tons being shipped between July 2013 and December 2013. (Tr. 686, 1683; SA 49-84). The gold exports continued, at least in part, because in late 2013, Cağlayan and the Turkish Prime Minister instructed Halkbank to support the country's export statistics. (Tr. 1663-65; SA 5-7).

During an October 29, 2013 conference call between Atilla and Treasury officials (including Director Szubin), Atilla represented that Halkbank stopped processing gold transactions before July 1, 2013 and

suggested that the gold exports were probably cash-based transactions by used jewelry merchants. (Tr. 1252, 1256-59, 1452-54; SA 91-93). Atilla also advised Director Szubin that Halkbank stopped processing humanitarian trade transactions by non-Turkish companies as of October 14, 2013, because the Turkish Ministry of the Economy (headed by Cağlayan) wanted to prioritize Turkish exports. (Tr. 1259-61, 1263-64, 1254-55). In fact, Halkbank stopped allowing non-Turkish companies to use NIOC funds for humanitarian trade so that money would instead be used in the evasion scheme with Zarrab. (Tr. 654-55, 1668-69; SA 5-7, 41).

5. Zarrab, Aslan, and Others' Arrests in Turkey, and the Resumption of the Scheme

On December 17, 2013, Zarrab, Aslan, Cağlayan, and others were arrested as part of a Turkish law enforcement investigation of corruption, money laundering, and other offenses. Simultaneously, Zarrab's and Aslan's homes and offices, among other places, were searched. (Tr. 696, 1296, 1373, 1566, 1568-69, 1573-75). Bundles of cash stuffed in shoe boxes, part of the bribes from Zarrab, were recovered from Aslan's home, along with documents about the scheme. (Tr. 1297-1300, 1565-66). Because the case implicated the Turkish administration, there was a swift and severe response. All of the officers and supervisors were removed from their positions, and many were later arrested. (Tr. 1374-77, 1381-83, 1561-64).

Within a few weeks, Zarrab bribed his way out of prison. (Tr. 696, 702). Though Aslan was no longer

with the bank, Zarrab began lobbying the new general manager, Ali Fuat Taşkesenlioğlu, to restart the gold and food trade using NIOC funds. (Tr. 697-705). The new general manager initially resisted, though his "team"—a group that included Atilla—supported Zarrab. (Tr. 1040-41). Zarrab enlisted the influence of the Prime Minister of Turkey and his then-Minister of Energy, Berat Albayrak, to overcome Taşkesenlioğlu's hesitation. (Tr. 944, 1036-38). When the scheme resumed, the only modification was that Zarrab would submit inspection reports for the fake food transactions—but still was not required to provide bills of lading. Atilla recommended inspection companies, one of which provided Zarrab with fake inspection reports. (Tr. 703-05, 1039-40).

In October 2014, Under Secretary Cohen met with Atilla and the new general manager in Washington, D.C. (Tr. 1147-51, 1340-50). As described above, by then Zarrab was out of prison and the scheme had resumed. Under Secretary Cohen referred to press reports that Zarrab had evaded sanctions against Iran and asked about the bank's relationship with him. Atilla blandly responded said that the bank had given Zarrab a construction loan and airplane lease financing, and the bank dealt with Zarrab to facilitate foreign trade. (*Id.*). Atilla provided no other information about the foreign trade in which Zarrab was involved. Atilla said that since Zarrab was not Specially Designated National, there was nothing Halkbank could do and that it had to keep doing business with Zarrab in order to be repaid on its loans. Atilla asked if Treasury intended to designate Zarrab, to which Under Secretary Cohen replied that Treasury did not announce its

intention to impose sanctions in advance. Under Secretary Cohen said that Treasury needed to know more about Zarrab, but Taşkesenlioğlu responded that Turkish regulations could prevent information sharing, "especially these days," though he would look into it. (*Id.*; A. 920). Under Secretary Cohen understood this to mean that Atilla and Taşkesenlioğlu "had told us [Treasury] everything they were intending to tell us about Mr. Zarrab." (Tr. 1151).[7]

B. The Verdict

The jury began deliberating on December 20, 2017. On January 3, 3018, the jury returned a verdict of guilty with respect to Counts One through Four and Count Six. Atilla was acquitted of Count Five.

C. Atilla's Motion for a Judgment of Acquittal

On December 15, 2017, after the close of the Government's case, Atilla moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). (Tr. 1884; A. 810-17). Atilla argued that the evidence was insufficient to prove that he knew of any

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[7] Atilla testified in his own defense over the course of two days. Because Atilla moved for a judgment of acquittal at the close of the Government's case-in-chief, his testimony is not relevant to this appeal. Atilla's repeatedly false testimony, however, resulted in the application of the obstruction enhancement under Section 3C1.1 of the United States Sentencing Guidelines at the time of his sentencing. (Dkt. 520 at 9, 12-19).

connection to the United States (A. 810-11); that willfully avoiding the imposition of sanctions was not a criminal violation under the IEEPA (A. 811-13); and that Counts One, Two, Four, and Six charged multiple conspiracies. (A. 813-16). The District Court reserved decision (Tr. 1973), and Atilla subsequently declined to move for post-trial acquittal (Dkt. 487), so that Atilla's testimony would not be included in the record on the motion. Fed. R. Crim. P. 29(b). On February 7, 2018, the District Court denied the motion. (A. 929-56).

D. The Sentencing

On May 16, 2018, Judge Berman sentenced Atilla to a term of 32 months' imprisonment and imposed a $500 mandatory special assessment. (A. 979-80).

ARGUMENT

POINT I

Sufficient Evidence Supported Atilla's Convictions

Atilla challenges the sufficiency of the evidence supporting his convictions bank fraud, bank fraud conspiracy, and money laundering conspiracy, as well as the sufficiency of the evidence with respect to one theory of liability for his IEEPA conspiracy conviction. Atilla contends that there was no evidence that he knew the scheme would involve U.S. banks. The evidence clearly established, however, Atilla's knowledge that the scheme would involve U.S. banks. Atilla's arguments to the contrary ignore the evidence and the

inferences the jury was entitled to make. Therefore, Atilla's challenge to the sufficiency of the evidence should be rejected.

A. Applicable Law

"A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). A jury verdict must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). A "court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004) (quotation marks omitted).

In considering the sufficiency of the evidence supporting a guilty verdict, the evidence must be viewed in the light most favorable to the Government. *United States v. Temple*, 447 F.3d 130, 136-37 (2d Cir. 2006). A reviewing court must analyze the pieces of evidence "in conjunction, not in isolation," *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) (quotation marks omitted), and must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others," *United States v. Riggi*, 541 F.3d 94, 108 (2d Cir. 2008) (quotation marks omitted). It is not the Government's burden to "disprove every possible hypothesis of innocence." *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir. 1998)

(quotation marks omitted). To the contrary, this Court must "credit[ ] every inference that the jury might have drawn in favor of the government," *Temple*, 447 F.3d at 136-37 (quotation marks omitted), because "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court," *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001).

In a conspiracy case, the deference accorded a jury's verdict is "especially important" because "a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). As with the other elements of a conspiracy, "a defendant's knowledge of the conspiracy and his participation in it with criminal intent may be established through circumstantial evidence." *United States v. Gordon*, 987 F.2d 902, 906-07 (1993).

This Court reviews *de novo* a preserved claim of insufficiency of the evidence. *United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012).

B. Discussion

Atilla contends that the evidence was insufficient to support his convictions for bank fraud, bank fraud conspiracy, and money laundering conspiracy, as well as one theory of liability underlying his IEEPA conspiracy conviction.[8] Atilla contends that each of these

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[8] Atilla's sufficiency claim regarding the IEEPA conspiracy is limited to the theory of liability based on

convictions must be set aside because there was no evidence that he knew the scheme would involve U.S. banks. (Br. 47-49). This claim has no merit. The evidence—which included, among other things, wire-tapped conversations, testimony from numerous witnesses (including a cooperating witness and high-ranking U.S. government officials personally involved in the events described at trial), and hundred of documentary exhibits—plainly established that Atilla was a knowing and vital participant in a sanctions evasion scheme that involved routing hundreds of millions of dollars through the U.S. financial system. In the face of that substantial evidence, Atilla cannot meet his "heavy burden" to overturn the jury's guilty verdict on Counts Two, Three, Four, and Six.

Numerous categories of evidence support the conclusion that Atilla knew that the scheme would involve U.S. banks. *First*, evidence showed that the very purpose of the scheme was to convert Iranian oil proceeds held at Halkbank into a slush fund that could be used to fund international payments on behalf of the Government of Iran and Iranian entities. For example, Zarrab testified that the goal of the conspiracy was to make international financial payments for the Iranian national oil company:

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direct violations of the applicable regulations and executive orders. (*See* Br. 48 & n.11). With respect to the alternative theory of liability based on avoiding the imposition of sanctions, Atilla argues only that the jury instructions were flawed. *See* Point II *infra*.

> The funds of Iranians which accumulated to gas and oil sales, and on the other side the Iranians had the international payment orders. I received those orders, and I made their international financial payments. Their income from gas and oil sales was accumulated in Halkbank. Taking those moneys out of Halkbank, I made the international payments.

(Tr. 267).

Also, Zarrab's detailed testimony explaining the various parts of the scheme demonstrated the importance of the final leg of the scheme—using NIOC oil proceeds illicitly transferred out of Halkbank through the gold and fake food transactions for international payments, including in U.S. dollars. (*E.g.*, Tr. 324-34 (describing and diagramming the scheme's use of fraudulent gold transactions to extract NIOC's oil proceeds from HalkBank and use them to fund international payments on behalf of NIOC), 559-567 (describing the scheme's use of fraudulent food transactions)). For example, Zarrab testified that the oil proceeds had to be removed from Halkbank "[b]ecause the Iranians could not use the income they developed from the oil and gas sales, they could not use that money for their international payments." (Tr. 269; *see also* Tr. 427-28 (describing the scheme as having "one purpose," which was "taking the Iranian money and getting it to its final destination")). And without the extraction of funds from Halkbank, there was no point to the scheme, because there would not be any money with which to ful-

fill the Iranian payment instructions. (*See* Tr. 335 (describing the extraction of the NIOC oil proceeds from Halkbank as the "heart" of the scheme)).

Second, evidence showed that the international payments that were part of the scheme were likely to pass through the U.S. financial system. Expert testimony at trial showed that the U.S. dollar is the most important international currency in global energy markets (Tr. 170), and U.S.-dollar transactions usually involve U.S. banks as part of the payment flow, even when the sending and receiving parties and the originating and receiving banks are foreign. (Tr. 190; *see also* Tr. 405-06, 478, 566-67, 1110, 1529-32). Expert testimony also demonstrated that NIOC—the principal beneficiary of the scheme—was particularly interested in "get[ting] access to dollars or Euros, to hard currency that it can either use to buy what it needs and/or send that money back to Iran so that the Iranian government had access to hard currency for its own economic needs." (Tr. 173-74). The jury could reasonably infer that Atilla, the Deputy General Manager for International Banking, had enough expertise and experience to know about the importance of U.S. dollars in international transactions and the integral role of U.S. correspondent banks in processing U.S.-dollar transactions.

Third, evidence showed that senior-level executives at Halkbank knew the particulars of the scheme, including the importance of the international payments and of U.S.-dollar transactions. For example, in a June 20, 2012 email between Aslan and Levant Bal-

kan, a Halkbank executive in the bank's operations department, Balkan laid out the scheme in explicit detail:

> It is understood that this gold, which is left in Dubai, can be used in all kinds of foreign payments of Iran, either in gold or in foreign currency. The fact that these gold deposits are collected in the various fiduciary accounts and used for international payments of the forbidden Iranian banks in Dubai (such as Bank Melli, Bank Sedarat) or Bank Mellat in Turkey. The gold transaction volume has reached remarkable dimensions in terms of international Iran sanctions.

(SA 46). Similarly, a simplified diagram of the food method that Zarrab drew for Halkbank was recovered from Suleyman Aslan's office by the Turkish police in December 2013. (SA 11-12; Tr. 573-77, 1677-78). That diagram shows the flow of funds from the accounts of Iranian banks at Halkbank, through intermediary companies' accounts at Halkbank, to Dubai, with the output of the scheme being international payments in U.S. dollars ("$"). The jury could reasonably infer that Atilla, a senior executive at Halkbank who was intimately involved with Zarrab and Aslan in planning and executing the scheme, was privy to similar discussions and documents reflecting that Iran's international payments would include U.S.-dollar payments.

Fourth, evidence showed that Atilla knew that the international payments involved in the scheme were payments on behalf of Iranian clients that Halkbank

itself refused to process directly. For example, Zarrab testified about the October 2012 meeting at Halkbank's offices attended by Atilla, Aslan, NIOC officials, Zarrab, and a representative from Sarmayeh Exchange, Rajaeie. At that meeting, the Iranian delegation directly asked Aslan and Atilla to allow international payment transactions for Zarrab's Iranian customers to be processed directly through Halkbank rather than through Zarrab. Both Aslan and Atilla rebuffed this request, insisting that the Iranian payments continue to flow through the network of Zarrab's companies to launder the funds via the gold method. (*See supra* at 9).[9] With Treasury, on the other hand, Atilla emphasized that Halkbank refused to permit U.S.-dollar transfers in the context of sanctions due diligence (Tr. 1430), reflecting his knowledge that the international payments Iran wanted would include

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[9] Zarrab's account of this meeting is corroborated by, among other things, a call between Zarrab and Aslan shortly after the October 2012 meeting. In that call, Aslan reported to Zarrab that Aslan had attended additional meetings with Iranian government officials, including the Iranian Oil Minister. Aslan also reported that, in response to similar requests for Halkbank to directly process the Iranian transactions, Aslan had resisted, stating that he had "defended the matter just like we talked yesterday," that the bank was not "opening accounts for every company," and that Zarrab was "ready in terms of bringing and sending money through the existing system." (Tr. 426-27).

dollar transfers. The jury, accordingly, could reasonably infer that Atilla wanted these transactions to remain obscured by Zarrab, rather than be processed by Halkbank directly, because Atilla knew that they violated international sanctions regimes, including U.S. sanctions on Iran. This inference is particularly reasonable given Atilla's significant experience with international sanctions.

Fifth, the information Atilla received at meetings with Treasury officials, as well as Atilla's statements during and after those meetings, were powerful evidence of Atilla's knowledge. During these meetings, Treasury warned Atilla repeatedly that Iran was actively seeking access to dollars in addition to gold and Euro. (Tr. 1117, 1133). Furthermore, not only did Atilla repeatedly lie to Treasury to conceal the scheme, such as when he falsely represented to OFAC Director Szubin that Halkbank was financing gold exports only to private Iranian citizens (*see, e.g.,* Tr. 1446), he also directed adjustments to the scheme based on what he learned from Treasury, such as when he instructed Zarrab to change his paperwork for gold shipments to state falsely "Iran via Dubai" in order to appear to comply with revised sanctions requirements, (Tr. 359-63, 691-93; SA 2-3). The jury could reasonably infer, based on the fact that Atilla lied to and concealed things from U.S. officials charged with sanctions enforcement, that Atilla was aware that the scheme involved international payments through U.S. banks that violated U.S. sanctions.

Sixth, evidence showed that millions of dollars in furtherance of the scheme did, in fact, pass through

the U.S. financial system. (Tr. 334-45, 566-68, 706-740, 1020-21). The jury could reasonably infer that Atilla and his co-conspirators intended the result they achieved, particularly in light of all the other evidence at trial.

Because there was sufficient evidence for a jury to conclude that Atilla knew that his sanctions-evasion scheme involved U.S. banks, Atilla's convictions should be affirmed.

POINT II

The District Court Properly Instructed the Jury that Atilla Could Be Convicted of Conspiring to Avoid a Prohibition

Count Two charged Atilla with conspiring to violate the IEEPA. The District Court instructed the jury on different theories of liability for that count. First, Atilla could be found guilty of conspiring to violate an existing sanctions prohibition. Second, Atilla could be found guilty of conspiring to avoid a sanctions prohibition. Atilla challenges the jury instruction embracing the latter theory.

Atilla's claim is meritless. The relevant regulations and executive orders unambiguously ban transactions designed to "avoid" prohibitions, the ordinary meaning of which is to prevent the imposition of prohibitions. Thus, the challenged jury instruction was correct. But even if there was an instructional error, it was harmless because the jury also necessarily found Atilla guilty of conspiring to violate an existing prohibition.

A. Applicable Law

1. Standard of Review

This Court "reviews a claim of error in jury instructions *de novo,* reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States v. Aina–Marshall,* 336 F.3d 167, 170 (2d Cir. 2003). That review is not conducted piecemeal; the object is "to see if the entire charge delivered a correct interpretation of the law." *United States v. Bala,* 236 F.3d 87, 94-95 (2d Cir. 2000) (quotation marks omitted). The requirement that any error in instructions be prejudicial precludes a defendant from obtaining relief where it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States,* 527 U.S. 1, 18 (1999).

2. The IEEPA and Relevant Regulations and Executive Orders

It is unlawful for a person "to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under" the IEEPA. 50 U.S.C. § 1705(a). A person who "willfully conspires to commit" such an unlawful act is subject to criminal penalties. *Id.* § 1705(c).

Subject to certain exceptions, the ITSR prohibits, among other things, the exportation from the United States of goods and services intended for Iran or its government, without a license from OFAC. 31 C.F.R. § 560.204. The execution of bank transactions is a "service" under the ITSR. *See United States v. Banki*, 685

F.3d 99, 108 (2d Cir. 2012) ("[T]he execution of money transfers from the United States to Iran on behalf of another, whether or not performed for a fee, constitutes the exportation of a service."); *United States v. Homa Int'l Tr. Corp.*, 387 F.3d 144, 145-46 (2d Cir. 2004) (executing financial transfers from the U.S. to Iran constitutes an exportation of a service).

Subject to certain exceptions, the IFSR prohibits, among other things, U.S. correspondent banking transactions with foreign financial institutions determined by Treasury to have engaged in certain sanctionable activity (such as facilitating transactions for the CBI or NIOC). 31 C.F.R. §§ 561.203-561.204. Once a foreign financial institution is sanctioned, the IFSR prohibits, among other things, U.S. correspondent banking transactions with the sanctioned foreign bank.

Executive Orders 13622 and 13645 authorized Treasury to prohibit, among other things, U.S. correspondent banking transactions with foreign banks that knowingly facilitated purchases of gold for the Government of Iran or for any Iranian. Executive Order 13645 further authorized Treasury to prohibit, among other things, U.S. correspondent banking transactions with foreign banks that knowingly facilitated financial transactions for the purchase of petroleum from Iran, unless the funds were used only for bilateral trade between the foreign country or the transaction was for the sale of agricultural commodities, medicine or medical devices to Iran. (*See* Tr. 1408-10).

Each of the above regulations and orders also prohibits"[a]ny transaction" that "evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth" in the respective regulation or order. 31 C.F.R. §§ 560.203(a), 561.205(a); Executive Order 13622 §9(a); Executive Order 13645 §13(a).

B. Discussion

1. The Jury Instruction on Avoidance of Prohibitions Was Correct

The District Court's instruction on the avoidance of prohibitions was correct. The ITSR, IFSR, and Executive Orders 13622 and 13645 (collectively, the "Regulations") each includes language prohibiting any transaction that "evades or avoids" or "has the purpose of evading or avoiding" any of the prohibitions set forth in the regulations. 31 C.F.R. §§ 560.203(a), 561.205(a); Executive Order 13622 §9(a); Executive Order 13645 §13(a) (the "Avoidance Provisions"). Atilla argues that he could not have conspired to engage in transactions that "evaded or avoided" a prohibition because Treasury did not make a prior determination that Halkbank engaged in sanctionable activity. (Br. 31-33). Atilla's argument is inconsistent with the text and purpose of the regulation.

In interpreting administrative regulations, this Court "must begin by examining the language of the provision at issue." *Banki*, 685 F.3d at 107 (quotation marks omitted). Atilla may well be correct that other prongs of the Avoidance Provisions—the language ad-

dressed to "caus[ing] a violation" of a prohibition, "attempt[ing] to violate" a prohibition, and "evad[ing]" a prohibition—are best understood to refer to existing prohibitions that have already been imposed. But the provisions also prohibit any transaction that "*avoids* . . . any of the prohibitions." *E.g.*, 31 C.F.R. § 561.205(a) (emphasis added). Because the Regulations do not define the term "avoid," it must be given its "ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Courts recognize that the ordinary meaning of the word "avoid" is "to prevent the occurrence of" or "to keep from happening." *E.g.*, *SUPERVALU, Inc. v. Bd. of Trustees of Sw. Pa. & W. Md. Area Teamsters & Employers Pension Fund*, 500 F.3d 334, 341 (3d Cir. 2007); *Lopresti v. Pace Press, Inc.*, 868 F. Supp. 2d 188, 201 (S.D.N.Y. 2012); *W. Va. Min. & Reclamation Ass'n v. Babbitt*, 970 F. Supp. 506, 515 n.9 (S.D. W. Va. 1997). Applying these ordinary, widely accepted definitions of "avoid" here, in the context of the Regulations, yields "a plain and unambiguous meaning with regard to the particular dispute in [this] case." *Banki*, 685 F.3d at 107 (quotation marks omitted). Simply put, the Avoidance Provisions prohibit any transaction designed to prevent the imposition of a prohibition set forth in the Regulations.

This reading of the term "avoid" is supported by this Court's interpretation of 18 U.S.C. § 1073, which prohibits interstate travel "to avoid prosecution." This Court rejected as "narrow and strained" a construction that would have required the formal institution of a prosecution, such as by the filing of an indictment, prior to the defendant's interstate flight. *United States v. Bando*, 244 F.2d 833, 843 (2d Cir. 1957). Just as

Bando recognized that a pending prosecution is not required to avoid prosecution under § 1073, here an existing prohibition under the Regulations is not required to avoid a prohibition under the Avoidance Provisions.

Atilla fails to offer any alternative meaning of the word "avoid." Instead, he simply lumps "evade" and "avoid" together and asserts in conclusory fashion that the Avoidance Provisions "only appl[y] to transactions that evade or avoid an *existing* 'prohibition' that has already been imposed on a foreign financial institution[.]" (Br. 33 (emphasis in original)). But Treasury could have achieved the same result by simply writing the Regulations to prohibit any transaction that "evades" a prohibition. Treasury instead wrote the Regulations to prohibit any transaction that "evades" or "avoids" a prohibition, and those two words should be interpreted to have independent meanings. *See WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 507 (2d Cir. 2013) (courts "presume Congress intends different terms in the same statute to have different meanings"). The fundamental flaw of Atilla's interpretation is that it effectively reads the word "avoid" out of the Regulations, even though courts have long "cautioned against reading a text in a way that makes part of it redundant." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007).

The Government's reading, however, gives effect to each term in the Regulations—both "evades" and "avoids." *Jay v. Boyd,* 351 U.S. 345, 360 (1956) (court "must read the body of regulations . . . so as to give effect, if possible, to all of its provisions"); *United States*

v. Halloran, 821 F.3d 321, 333 (2d Cir. 2016) (courts "must give effect to every word of a statute wherever possible" (quotation marks omitted)). On one hand, the "evade" clause prohibits transactions designed to get around existing prohibitions. On the other hand, the "avoid" clause prohibits transactions designed to prevent the imposition of future prohibitions.

To the extent that the text of the Avoidance Provisions leaves any doubt as to the meaning of the "avoid" clause, the purpose underlying the Regulations confirms the Government's reading. *See Banki*, 685 F.3d at 107 (considering "the broader text and purpose of the ITR to aid our interpretation"). The President has repeatedly found that Iran presents an "unusual and extraordinary threat" to national security, *see id.* at 108, and the Regulations are measures adopted to address that threat. The purpose of the Regulations is to cut off indirect access by Iran to the U.S. banking system through foreign financial institutions. Thus, much like the regulations at issue in *Banki*, the Regulations "adopt a blunt instrument: broad economic sanctions intended to isolate Iran." *Id.* Interpreting the Avoidance Provisions to prohibit both transactions that "evade" existing prohibitions and those designed to "avoid" the imposition of future prohibitions would further this critical regulatory purpose. *See United States v. Al Kassar*, 660 F.3d 108, 125 (2d Cir. 2011) (recognizing that courts should "interpret statutes to give effect to congressional purpose," and rejecting narrow interpretation of criminal liability that would "undermine" statutory purpose to prevent "harm [to] the national security or foreign relations of the United States").

Atilla's interpretation, on the other hand, would wholly eliminate one of the regulation's bases for liability, thus curtailing the effectiveness of the Regulations. Under Atilla's view, the Regulations would not prohibit "avoiding the imposition of sanctions by unlawfully concealing the true nature of a transaction." (Tr. 2410). Thus, foreign bank officials would be free to execute concealed transactions on behalf of Iran through the U.S. financial system and lie to OFAC with impunity, so long as they did so prior to the imposition of a prohibition. Such a perverse result would undermine, for no discernible reason, the Regulations' purpose of protecting national security. After all, Iran's use of a foreign bank to access the U.S. financial system would "have the same impact *in Iran*," regardless of whether the foreign bank has yet been sanctioned. *Banki*, 685 F.3d at 108.

In light of the purposes underlying the IEEPA and the Regulations, Atilla's resort to the presumption against extraterritoriality clearly has no merit. (*See* Br. 38-39). That presumption does not apply to criminal statutes that "are, as a class, not logically dependent on their locality for the Government's jurisdiction," *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (quotation marks omitted). Of course, the *International* Emergency Economic Powers Act has an extraterritorial focus. The IEEPA authorizes the President to investigate, regulate, or prohibit, among other things, "any transactions in foreign exchange" and "payments between, by, through, or to any banking institution, to the extent that such . . . payments involve any interest of any foreign country." 50 U.S.C.

§ 1702(a)(1)(A). Furthermore, the President's authority under the Act "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States." 50 U.S.C. § 1701(a). As for the Regulations, their purpose is to curtail Iran's ability to fund its malign activities (supporting terrorism, pursuing a military nuclear program, developing ballistic missiles) by presenting foreign financial institutions with a choice between doing business with Iran or doing business with the United States. There is no reason to believe that Congress intended the IEEPA, or that the President intended the Regulations, to apply only in the United States. *See United States v. Epskamp*, 832 F.3d 154, 164 (2d Cir. 2016) (rejecting interpretation that would "have the peculiar effect of establishing a purely domestic crime within a statute aimed at combatting narcotics smuggling and importation where every other provision applies extraterritorially").

Nor does the presumption against extraterritoriality apply to criminal statutes that are "aimed at protecting the right of the government to defend itself." *United States v. Vilar*, 729 F.3d 62, 73 (2d Cir. 2013) (quotation marks omitted). As this Court recognized in *Banki*, the Iranian sanctions regime is specifically addressed to the threat that Iran poses to national security. In addition, by banning transactions that "avoid" a prohibition, the Regulations are aimed at protecting Treasury's ability to enforce its own sanctions regime.

Application of the presumption against extraterritoriality is, moreover, particularly inappropriate in this case because Atilla reached into the United States

to commit his crime. Atilla conspired with others to execute hundreds of millions of dollars' worth of transactions on behalf of Iran through the accounts of unwitting U.S. banks, and he concealed those transactions with the purpose of avoiding U.S. sanctions. Atilla also lied repeatedly to U.S. government officials in connection with those transactions, including in meetings in the United States.

Atilla also attempts to support his interpretation with OFAC's historical position that "punitive measures . . . attach only after a foreign financial institution has been sanctioned by" Treasury. (A. 780). Atilla argues that this historical position is dispositive and "forecloses" the interpretation adopted by the District Court. (Br. 34-35). But OFAC acknowledged that "the unique circumstances of this case—involving willful attempts to mislead OFAC officials and the conscious design of a transactional scheme for the express purpose of avoiding the imposition of secondary sanctions—have not previously been confronted." (A. 779). Furthermore, Treasury "defers" to the Department of Justice "with respect to criminal prosecutions." (A. 780). Thus, OFAC's historical position cannot bear the weight of Atilla's argument. In any event, OFAC's historical position would not be entitled to deference because the Avoidance Provisions are unambiguous. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (agency interpretation of own regulation is entitled to deference "only when the language of the regulation is ambiguous"). For the reasons set forth above, the Avoidance Provisions' text plainly prohibits transactions designed to "avoid" the imposition of a prohibition.

Atilla next claims that the interpretation adopted by the District Court raises vagueness concerns. (Br. 40-42). The Supreme Court has "made clear," however, "that scienter requirements alleviate vagueness concerns." *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007); *see also Screws v. United States*, 325 U.S. 91, 102 (1945) ("The requirement that the act must be willful or purposeful . . . relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware."). Here, the District Court gave the jury three instructions that made crystal clear to the jury that even under the theory of avoiding a sanctions prohibition, it could find Atilla guilty only upon a finding of willfulness.

First, the District Court instructed the jury that the Government "must establish that the conspirators agreed to engage in transactions for the purpose of avoiding the prohibition." (Tr. 2410). The purpose to avoid the prohibition had to be "a dominant reason" for the agreement. (*Id.*). As Judge Berman explained, this requirement would be satisfied if "the conspirators believed that the sanctions could be imposed, and acted in that belief in agreeing to engage in a transaction or transactions designed to avoid the imposition of those sanctions. In other words, avoiding the imposition of sanctions by unlawfully concealing the true nature of a transaction would violate the prohibition on evading or avoiding the prohibition." (*Id.*).

Second, the District Court instructed the jury that it had to find that Atilla "acted willfully," which meant that he "acted intentionally and purposefully with the intent to do something the law forbids, that is, with

bad purpose to disobey or to disregard the law. And here, it would be to violate the U.S. embargo on certain transactions with Iran." (Tr. 2411).

Third, Judge Berman instructed the jury on the good-faith defense:

> A defendant's conduct—we're talking now about the IEEPA conspiracy—is not willful if it was the result of a good-faith understanding that he was acting within the requirements of the law. A defendant may not be held liable for a violation of IEEPA if the defendant acted, or chose not to act, in a good-faith belief that he was complying with the licenses, orders, regulations, or prohibitions issued pursuant to IEEPA.
>
> In other words, if you find that the defendant acted in good faith, then he may not be convicted of a conspiracy to violate IEEPA.

(Tr. 2412). The District Court's detailed instructions ensured that the jury would convict Atilla on an avoidance theory only if he acted willfully with the illicit purpose to avoid the imposition of sanctions, and not merely because the transactions in his scheme happened to have the effect of avoiding sanctions.[10]

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[10] For much the same reason, Atilla's argument that OFAC's historical position negated his willfulness has no merit. (Br. 36). Atilla was free to argue to the

Finally, the rule of lenity has no relevance here. (*See* Br. 39-40). The rule of lenity is an interpretive tool of last resort: it is "reserved for cases where, after seizing everything from which aid can be derived, the Court is left with an ambiguous statute." *DiPierre v. United State*s, 564 U.S. 70, 88 (2011) (quotation marks omitted). The rule is not a thumb on the scales in favor of the defendant. Indeed, the Supreme Court has repeatedly emphasized that "the mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable." *Smith v. United States*, 508 U.S. 223, 239 (1993). The canon applies only if, "after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013) (quotation marks omitted). For the reasons set forth above, the Regulations' text and purpose plainly establish that the Avoidance Provisions prohibits transactions designed to "avoid" the imposition of a prohibition.

In sum, the District Court's jury instruction on the avoidance of sanctions prohibitions was correct.

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jury that it was unthinkable that he could be prosecuted for purposefully disguising the nature of illicit transactions for Iran in order to avoid the imposition of sanctions on Halkbank. And in light of the proper good-faith instruction, the jury was free to accept or reject such an argument.

2. Any Instructional Error Was Harmless Because Atilla Was Necessarily Convicted of Conspiring to Export Financial Services from the United States

Even if the jury instructions regarding avoidance of prohibitions were flawed, Atilla would not be entitled to vacatur of his conviction on Count Two. Any error in the instruction was harmless because Atilla was necessarily convicted on Count Two under a properly instructed alternative theory of liability. *See United States v. Ferguson*, 676 F.3d 260, 277 (2d Cir. 2011) (any instructional error as to one theory of liability is harmless if "the jury would have necessarily found the defendant[ ] guilty on one of the properly instructed theories of liability").

The District Court instructed the jury that it could find Atilla guilty of Count Two based on a conspiracy to violate the ITSR by exporting services (including the execution of U.S. dollar transfers) from the United States to Iran:

> [O]rders, regulations, or prohibitions issued pursuant to IEEPA provided that the exportation, reexportation, sale or supply, directly or indirectly, from the United States or by a United States person, wherever located, of any goods, technology or services to Iran, or the government of Iran, is prohibited unless the transaction was for the export of agricultural commodities, medicine and medical devices or was authorized by a license from OFAC. In this regard, I instruct you

> that the execution of dollar denominated money transfers from the United States on behalf of another, whether or not performed for a fee, constitutes the exportation of a service. Services may be provided indirectly, for example, if funds are transferred to Iran on or behalf of an Iranian person or business through an intermediary, or if they are transferred to a third party for the benefit of, or on behalf of, the government of Iran, or if they are transferred to a third party acting as an agent of the government of Iran.

(Tr. 2406-07). Atilla does not challenge the validity of this instruction.

Atilla's convictions for bank fraud and bank fraud conspiracy demonstrate that the jury necessarily found Atilla guilty of Count Two based on the properly instructed ITSR theory. The Indictment expressly alleged in the bank fraud count that Atilla "induc[ed] U.S. financial institutions to conduct financial transactions on behalf of and for the benefit of the Government of Iran and Iranian entities and persons using money and property owned by and under the custody and control of such financial institutions." (A. 242). To find Atilla guilty of bank fraud and bank fraud conspiracy (Counts Three and Four), the jury was required to find, among other things, that Atilla obtained or agreed to obtain, through deceit, funds in the custody of one of several named federally insured banks located in the United States. (Tr. 2379-80, 2383-84). Atilla's convictions on Counts Three and Four

therefore necessarily establish that the jury found beyond a reasonable doubt that Atilla agreed to transfer money from the United States to Iran. *See United States v. Coppola*, 671 F.3d 220, 237-38 (2d Cir. 2012) (defective theory harmless if jury "necessarily would have had to" find defendant guilty of valid ground).

Accordingly, Atilla's conviction on Count Two should be affirmed.

POINT III

Atilla's Conviction for Conspiracy to Defraud the United States Is Valid

Atilla challenges his conviction on Count One of the Indictment, which charged him with conspiracy to defraud the United States. Atilla contends that the conspiracy statute should be construed narrowly so as not to reach his conspiracy to obstruct Treasury's enforcement of economic sanctions laws. Because this argument is foreclosed by both the statutory text and a century of controlling precedent, the conviction should be affirmed.

A. Applicable Law

The general criminal conspiracy statute, 18 U.S.C. § 371, prohibits two types of conspiracies. The "offense clause" makes it unlawful to conspire "to commit any offense against the United States"; and the "defraud clause" prohibits conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." To prove a conspiracy to defraud the United

States, the Government must show "(1) that [the] defendant entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy." *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996) (alteration and quotation marks omitted).

This Court reviews *de novo* preserved claims regarding "[t]he sufficiency of an indictment and the interpretation of a federal statute," *United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012), as well as preserved claims regarding the interpretation of a statute raised in the context of a Rule 29 motion for a judgment of acquittal, *United States v. Ivezaj*, 568 F.3d 88, 91 (2d Cir. 2009). If, however, a defendant objects below but advances a different argument on appeal, his claim is reviewed for plain error. *United States v. Ubiera*, 486 F.3d 71, 74 (2d Cir. 2007) (defendant objected below but "raise[d] a substantially different argument on appeal"); *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001) ("defendant failed to renew his motion for acquittal on th[e] ground [pressed on appeal"); *United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995) ("in his Rule 29 motion below, [defendant] stated a ground different from what he now urges on appeal"). Plain error is a stringent standard, requiring an appellant to demonstrate that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[ed] the fair-

ness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (quotation marks omitted).

B. Discussion

As an initial matter, the standard of review is plain error. Atilla moved to dismiss, and later moved for a judgment of acquittal with respect to, Count One, but on preemption and extraterritoriality grounds that are different from his arguments on appeal. (*See* A. 269 (arguing that "[t]he statutes, orders and regulations comprising the Sanctions Regime were intended to occupy the entire field of sanctions, to the exclusion of all other laws"); A. 812 (arguing that "application of *Klein* to a foreigner is legally unjustifiable and unprecedented")). Accordingly, Atilla failed to preserve the specific arguments he raises in this Court, and the plain-error standard applies.

At a minimum, Atilla has not established plain error because "there is no binding precedent from the Supreme Court or this Court" supporting his claim. *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004). The Government is not aware of any decision accepting Atilla's argument that § 371's defraud clause does not apply to conspiracies to obstruct Treasury's enforcement of economic sanctions laws, and Atilla certainly has pointed to no such binding precedent. In any event, under any standard of review, Atilla's claim fails because the defraud clause was properly applied here.

Atilla begins by contending that the defraud clause should be interpreted to incorporate the common law

meaning of fraud and thus should be limited to conspiracies to deprive the government of property. (Br. 58-59). But it has been "well established" for over a century that the term "defraud" in § 371 " 'is not confined to fraud as that term has been defined in the common law.' " *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2012) (quoting *Dennis v. United States*, 384 U.S. 855, 861 (1966), and citing *Haas v. Henkel*, 216 U.S. 462, 479 (1910)). The defraud clause is broadly "designed to protect the integrity of the United States and its agencies." *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir. 1987); *see also McNally v. United States*, 483 U.S. 350, 358 n.8 (1987) (explaining that the "broad construction of [the defraud clause] is based on" its unique purpose—"the protection and welfare of the government" (quotation marks omitted)). Thus, it is settled law that the defraud clause "not only reaches schemes which deprive the government of money or property," but also "embraces 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.' " *Nersesian*, 824 F.2d at 1313 (quoting *Dennis*, 384 U.S. at 861); *see also Tanner v. United States*, 483 U.S. 107, 128 (1987) ("[W]e have stated repeatedly that the fraud covered by the statute reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." (quotation marks omitted)).

Citing *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), Atilla suggests that most precedents under the defraud clause "involved a conspiracy to impede and obstruct Treasury in the collection of income taxes." (Br. 59 (alterations and quotation marks omitted)).

Thus, Atilla argues, the defraud clause should not be "extended" to the facts of this case. (Br. 60). But the defraud clause has never been limited to conspiracies to obstruct the IRS in its collection of taxes. Since its earliest decisions interpreting the defraud clause, the Supreme Court has applied the clause to conspiracies to obstruct the functions of a variety of government agencies. *Dennis*, 384 U.S. at 857, 861 (National Labor Relations Board); *United States v. Johnson*, 383 U.S. 169, 172 (1966) (Department of Justice); *Lutwak v. United States*, 344 U.S. 604, 605 (1953) (Immigration and Naturalization Service); *Glasser v. United States*, 315 U.S. 60, 63, 66 (1942) (United States Attorney's Office); *Hammerschmidt v. United States*, 265 U.S. 182, 185 (1924) (Selective Service System); *Haas*, 216 U.S. at 479 (Department of Agriculture's Bureau of Statistics); *see also Tanner*, 483 U.S. at 110, 128 (Department of Agriculture's Rural Electrification Administration). And while conspiracies to obstruct the IRS have come to be known in this Circuit as *Klein* conspiracies, this Court has also applied the defraud clause to the obstruction of various federal agencies other than the IRS. *United States v. Mancuso*, 428 F. App'x 73, 79-80 (2d Cir. 2011) (Environmental Protection Agency and other regulators); *United States v. Stewart*, 590 F.3d 93, 102, 109-11 (2d Cir. 2009) (Bureau of Prisons); *Ballistrea*, 101 F.3d at 831-33 (Food and Drug Administration); *United States v. Bilzerian*, 926 F.2d 1285, 1302 (2d Cir. 1991) (Securities and Exchange Commission and IRS). Thus, Atilla is flatly wrong in suggesting that there is anything unusual about applying the defraud clause outside the context of tax-collection by the IRS.

Atilla next argues that the defraud clause should not be applied to this case because this prosecution has interfered with the executive branch (both in general and in the conduct of foreign affairs). (Br. 60-64). This argument ignores the fact that the Department of Justice is part of the executive branch and that this prosecution is an executive function. The Justice Department brought criminal charges authorized by Congress to protect the integrity of the functions of the Treasury Department in administering and enforcing sanctions promulgated by the President to respond to foreign threats to this country's national security.[11] Atilla would have this Court hobble one executive department (Justice) in the name of protecting another executive department (Treasury). The Court should decline Atilla's invitation to have the judiciary interfere with permissible executive judgments.

Nor can Atilla's arguments be squared with the text of § 371. The defraud clause does not single out the IRS and the collection of taxes as the only federal agency and function covered by the statute. Nor does

[11] Atilla argues that the misrepresentations Atilla made and conspired to make were "immaterial" to Treasury because Halkbank has not been sanctioned since the disclosure of those misrepresentations. (Br. 62). Atilla ignores the fact that the relevant sanctions provisions were suspended as a result of implementation of the Iran nuclear agreement in January 2016—after Atilla and his colleagues successfully deceived Treasury for years but before Atilla's crimes were publicly unmasked.

§ 371 exempt OFAC and sanctions enforcement from the statute's coverage. To the contrary, the defraud clause broadly prohibits conspiracies "to defraud the United States, or *any agency thereof* in any manner or for any purpose." 18 U.S.C. § 371 (emphasis added). Atilla would have this Court interpret the term "defraud" broadly to reach obstruction with respect to the IRS but narrowly to reach only deprivation of property with respect to OFAC. Neither the statutory language nor controlling precedent permits such a drastic rewrite of the defraud clause.

Finally, citing *Marinello v. United States*, 138 S. Ct. 1101 (2018), and *Skilling v. United States*, 561 U.S. 358 (2010), Atilla contends that the defraud clause should be construed narrowly to avoid vagueness concerns. (Br. 64-66). *Marinello* is inapposite, as the Supreme Court imposed a nexus requirement under 26 U.S.C. § 7212(a) based on statutory text, context, and history wholly unrelated to § 371's defraud clause. Furthermore, just a few years ago, this Court rejected a similar argument invoking the vagueness concerns in *Skilling* to "pare the body of § 371 precedent down to its core." *Coplan*, 703 F.3d at 62 (quotation marks omitted). The holding in *Coplan* is equally applicable here: this Court is "bound to follow" both "the law of the Circuit" and "long-lived Supreme Court decisions"

that have definitively adopted and reaffirmed the "expansive reading of § 371" given by courts. *Id.* at 61-62.[12]

Accordingly, Atilla's conviction on Count One should be affirmed.

POINT IV

The District Court Properly Excluded the Jail Call and Transcript

Atilla argues that the District Court erred by excluding a recording of an Azeri-language phone call Zarrab participated in while detained (the "Jail Call"), as well as a translation of the call (the "Transcript"). Zarrab's prior statements were not admissible because they were not inconsistent with his testimony and they concerned a collateral matter. Accordingly, the District Court did not abuse its discretion in excluding the evidence.

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[12] Nor does the rule of lenity, which Atilla invokes in perfunctory fashion (Br. 65 n.16), have any relevance here. The rule of lenity "is not applicable unless there is a grievous ambiguity" in the statute. *United States v. Shellef*, 507 F.3d 82, 106 (2d Cir. 2007) (quotation marks omitted). There is no ambiguity here because "the statute, as interpreted by [this Court's] case law, makes clear that [Atilla's] conduct is proscribed." *Id.* (declining to apply rule of lenity to defraud clause).

A. Relevant Facts

On December 2, 2017, prior to the cross-examination of Zarrab, the Government produced to defense counsel five recorded foreign-language telephone conversations that Zarrab had participated in while detained, together with English summaries of those calls. (*See* A. 764, 767, 775). The Government produced these calls as soon as it learned that they contained arguably Jencks Act material. The production included the Jail Call, an Azeri-language conversation between Zarrab and his uncle in September 2016; and an English summary of the call. The summary reflected that Zarrab had made a statement to the effect that, "in order to get a reduced sentence you need to admit to crimes you haven't committed" and that in the United States, to "make it out of prison you have to admit to something you haven't committed." (*See* A. 777).[13]

Atilla's counsel began cross-examining Zarrab the morning of December 5, 2017. (Tr. 777). Cross-examination continued over the next two-and-a-half days, ending at the lunch recess on December 7. (Tr. 1014).

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[13] On December 4, 2017, Atilla filed a letter claiming that the production of these calls violated an order entered by the district court that directed the Government to produce any *Brady* material by November 28, 2017. (A. 767-69). The District Court held that the recorded conversations were not *Brady* material, but could be used for impeachment. (A. 763).

Defense counsel principally sought to impeach Zarrab's credibility and attempted to establish that Zarrab's cooperation agreement was a motive to provide false testimony or that he harbored ill feelings towards Atilla. (*See, e.g.*, Tr. 778). Defense counsel also asked Zarrab about his understanding of the purpose of his cooperation and the possibility of receiving a reduced sentence as a result of his cooperation. (Tr. 789, 794-95). Defense counsel further cross-examined Zarrab about his history of making misrepresentations, including eliciting instances in which Zarrab lied to (i) the FBI (Tr. 796); (ii) the Pretrial Services officer who interviewed him after his arrest in Miami (Tr. 810-11); (iii) Turkish tax authorities, by understating his income on his Turkish tax filings (Tr. 813); (iv) banks (Tr. 1002); (v) Halkbank employees (Tr. 868-69, 1002); (vi) Turkish law enforcement authorities (Tr. 1007); (vii) Turkish courts (Tr. 1009); and (viii) Atilla. (Tr. 895, 1002). Defense counsel also questioned Zarrab about specific aspects of the scheme that involved dishonesty, such as the submission of fraudulent documents to Halkbank in connection with the gold and fake food transactions. (*See* Tr. 825-26, 830-31).

Near the end of the cross-examination, defense counsel turned to the Jail Call:

> Q: You made a call on September 15th, 2016, to your Uncle [], correct, from the jail?
>
> A: I don't recall the dates, but it is true that I had made many phone calls to my uncle from the jail; that is correct, ma'am.

> Q:You told your uncle that, in this country, you have to admit to something you haven't done in order to become free; once you admit your guilt, you become free; isn't that correct?
>
> A: That is absolutely not correct, ma'am.

(Tr. 1010). After Zarrab denied having made that statement, defense counsel sought to play the Jail Call in Azeri and introduce the Transcript, which had not been authenticated through the testimony of a translator or by stipulation. (*Id.*). Defense counsel argued the call and transcript were admissible for "impeachment purposes." (*Id.*). At sidebar, the Government argued that extrinsic evidence was not admissible for impeachment. (Tr. 1011). Defense counsel then argued that she did *not* intend to impeach Zarrab with the Jail Call, but simply intended to play it (*id.*), but later stated again that "I have to be able to impeach him with his own statement." (Tr. 1012). Defense counsel never argued that the Jail Call was evidence of bias. Judge Berman denied the request to play the Jail Call or introduce the Transcript, but stated that defense counsel should ask Zarrab if he had made those statements. (Tr. 1012).

Resuming cross-examination, defense counsel asked:

> Q: You spoke with your uncle about how you get out of jail in the United States, correct?
>
> A: That is not correct, ma'am.

> Q: You didn't tell him that you have to admit to something you haven't done in order to get free?
>
> A: That is not correct, ma'am.

(Tr. 1013). Defense counsel asked no other questions about the Jail Call.

Later, defense counsel argued that the Jail Call should be admitted as a prior inconsistent statement. (Tr. 1059). On December 18, 2017, after the Government rested and the defense case had started, Atilla filed an application seeking to admit the Jail Call and Transcript as prior inconsistent statements. (A. 822). Relying on the unauthenticated Transcript, defense counsel argued that Zarrab had said the following:

> 00:01:36 Zarrab: [Uncle], it is not like that. I am telling you [UI]. Here, when you come around and say "OK, yes, I did this shit," look, this leaves you in peace. Once you confessed (to doing shit), they do not mess up with you.
>
> * * *
>
> 00:01:57 Zarrab: Did you get it? I have already partially admitted my guilt.
>
> * * *
>
> 00:02:32 Zarrab: But there is no rule of law here. There is no rule of law here, look. Here you have to admit to something you haven't done. This is how it works here. This country is like this.

> Look, you have to say you have done something you haven't.
>
> * * *
>
> 00:04:42 Zarrab: Do you know what is important? You admit your guilt here. . . This oppression that exists here, it is only in America. It doesn't happen in other countries. . . But once you admit your guilt, you are set free. That's it, getting free. It is like you swallow it.

(A. 823). Atilla argued that these statements were inconsistent with Zarrab's testimony, and were therefore relevant because they "relate[] directly to Zarrab's state of mind regarding the need—or absence of need —for veracity in what turned out to be his upcoming proffer sessions with the Government. His belief that a prospective cooperating defendant had to lie in order to obtain an acceptable deal from the Government constitutes a remarkable commentary on the motive underlying his trial testimony in this case."[14] (A. 824). Atilla did not argue that the Jail Call and Transcript were admissible as evidence of some sort of bias. The Government responded that the defense had changed its theory of admissibility to that of a prior inconsistent statement.[15] (A. 835). The Government argued

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[14] Zarrab pleaded guilty pursuant to a cooperation agreement on October 26, 2017, more than one year after the date of the Jail Call.

[15] The Government also noted that the unauthenticated Transcript appeared replete with errors.

that, if offered as a prior inconsistent statement, the Jail Call was inadmissible because (a) there was no inconsistency between Zarrab's testimony and the statements reflected in the Transcript, and (b) even assuming that there was any inconsistency, the alleged inconsistency related to a collateral matter, namely, Zarrab's state of mind as a cooperating witness, rather than to Atilla's participation in the charged offenses. (A. 836-37).

On December 21, 2017, the District Court denied the application to introduce the Jail Call and Transcript. (A. 843). Judge Berman found that defense counsel had an opportunity to cross-examine Zarrab about the Jail Call and that Federal Rule of Evidence 608 barred its admission as extrinsic evidence to impeach his testimony. (A. 843-44). The District Court further found that the Jail Call and Transcript were not admissible as prior inconsistent statements because they pertained to collateral matters. (A. 845). Finally, Judge Berman noted that the defense cross-examination about the Jail Call had been of "little or no probative value" and that defense counsel had not mentioned the Jail Call during his summation. (A. 845-47).

B. Applicable Law

It is generally proper to cross-examine a witness by asking whether the witness previously made statements inconsistent with his trial testimony. *See* Fed. R. Evid. 613(b). However, where the allegedly inconsistent prior statement relates to a collateral topic, cross-examining counsel is bound by the answer given

by the witness. If the witness denies having made the allegedly inconsistent prior statement, counsel may not seek to impeach that denial by offering extrinsic proof of the prior statement. Rather, "a witness may be impeached by extrinsic proof of a prior inconsistent statement only as to matters which are not collateral, *i.e.*, as to those matters which are relevant to the issues in the case and could be independently proven." *United States v. Blackwood*, 456 F.2d 526, 530 (2d Cir. 1972).

Federal Rule of Evidence 608(b) also generally prohibits the admission of extrinsic evidence on a collateral issue. Rule 608(b) provides that "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b); *see also United States v. Purdy*, 144 F.3d 241, 245-46 (2d Cir. 1998) ("[e]xtrinsic evidence offered for impeachment on a collateral issue is properly excluded"; defense was correctly precluded from calling an agent to impeach a government witness regarding the exact number of kickback-procured contracts). Even considering this evidence under the rubric of "impeachment by contradiction," *see United States v. Garcia*, 900 F.2d 571, 575 (2d Cir. 1990), "extrinsic evidence (*i.e.*, evidence offered through another witness) is admissible to impeach by contradiction only if the prior testimony being contradicted is itself material to the case at hand." 4 Joseph M. McLaughlin *et al.*, Weinstein's Federal Evidence § 608.20[3][a] (2d ed. 2003). "A collateral contradiction is typically one on a point not related to the matters at issue, but designed to show that the witness' false statement about one thing implies a

probability of false statements about the matters at issue." *United States v. Higa,* 55 F.3d 448, 452 (9th Cir. 1995) (citation omitted).

Trial courts enjoy broad discretion to decide evidentiary issues. *See*, *e.g.*, *United States v. Khalil*, 214 F.3d 111, 122 (2d Cir. 2000). A trial judge's evidentiary rulings are reviewed for abuse of discretion. *See United States v. Taubman*, 297 F.3d 161,164 (2d Cir. 2002); *United States v. Naiman*, 211 F.3d 40, 51 (2d Cir. 2000). "To find such an abuse, [this Court] must be persuaded that the trial judge ruled in an arbitrary and irrational fashion." *United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996).

It is equally well-settled that an error in admitting or excluding evidence should be disregarded if the error is harmless. *See* Fed. R. Crim. P. 52(a); *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992). For an error to be deemed harmless, the court is "not required to conclude that it could not have had any effect whatever; the error is harmless if we can conclude that that testimony was 'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."' *Rea*, 958 F.2d at 1220 (citation and quotation marks omitted). In determining whether the exclusion of cross-examination material is harmless, appellate courts evaluate a "host of factors," including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on

material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the government's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

Issues not raised in the district court are reviewed for plain error. *United States v. Keppler*, 2 F.3d 21, 23-24 (2d Cir.1993). Plain error is a stringent standard, requiring an appellant to demonstrate that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Marcus*, 560 U.S. at 262 (quotation marks omitted).

C. Discussion

Echoing one of his arguments below, Atilla contends that the Jail Call and the Transcript should have been admitted as prior inconsistent statements of Zarrab. In addition, Atilla argues for the first time on appeal that the Jail Call and the Transcript should have been admitted as evidence of Zarrab's bias. Neither argument has any merit, and the District Court acted well within its substantial discretion in excluding the evidence.

The Jail Call and Transcript were not admissible as prior inconsistent statements. At trial, Zarrab denied having spoken with his uncle about how to get out of jail or about having to admit to something he had not done in order to get out of jail. As even the defense

Transcript shows,[16] Zarrab did not make those statements. The Transcript reflects that, in response to his uncle's statement that Zarrab had not done anything, Zarrab allegedly said "[h]ere you have to admit to something you haven't done." Then, after two minutes of additional conversation and having changed topics to the transfer of "shops,"[17] Zarrab purportedly said, "once you admit your guilt, you are set free." The Transcript does not reflect that the concept of admitting to something that Zarrab had not done was equated with being set free, which was the direct question that was posed by defense counsel at trial. (Tr. 1013) ("You didn't tell him that you have to admit to something you haven't done in order to get free?"). The Transcript reflects that the statement about admitting guilt was made in the context of resolving the transfer of

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[16] The Government does not concede the accuracy of Atilla's error-riddled transcript of the Jail Call, but this Court need not resolve that disagreement to conclude that the evidentiary claim does not warrant relief.

[17] Atilla speculates that Zarrab may have been speaking in code, and that "shops" is a reference to "guys." (Br. 25). That speculation is completely unfounded, and Atilla did not even attempt to establish this theory during cross-examination. Moreover, the context of the statement actually contradicts Atilla's theory: Zarrab implicated many co-conspirators, but in the Transcript Zarrab refers to only two "shops."

"shops," and not in the context of offering a false confession to be released from prison. (A. 830-32).[18] Accordingly, the foundational requirement of a inconsistency is not met. *See United States v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995) (describing the requirements for introduction of a prior inconsistent statement).

Even if Atilla's misconstruction of Zarrab's statements were adopted, the Jail Call would still be inadmissible because it relates to a collateral matter. *See Blackwood*, 456 F.2d at 530 ("[A] witness may be impeached by extrinsic proof of a prior inconsistent statement only as to matters which are not collateral, *i.e.*, as to those matters which are relevant to the issues in the case and could be independently proven."). Atilla contends that the Jail Call showed Zarrab's belief that he would be required to lie as a cooperating witness, but Atilla's argument is squarely foreclosed by *United States v. Coven*, 662 F.2d 162 (2d Cir. 1981). In *Coven*, a cooperating witness testified about a large-scale fraud that the witness had engaged in with the defendant. *See id.* at 167. The defendant argued he should be permitted to question the cooperating witness about conversations the witness had with his attorneys about his cooperation agreement to establish the witness's pro-Government bias. *See id.* at 170-71. This

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[18] Defense counsel could have asked more specific questions about the Jail Call to attempt to either elicit what Zarrab actually said during that call, or to demonstrate an actual inconsistency between his recollection and the recording, but counsel did neither.

Court concluded that the cooperating witness's "state of mind when signing the cooperation agreement was a collateral matter going only to [the cooperating witness's] general credibility." *Id.* at 171.

The same is true here. The only relevance of the Jail Call that Atilla has articulated is that Zarrab purportedly "had a motive to testify falsely because he had previously expressed an understanding that he needed to lie about his scheme to minimize his sentence." (Br. 71). This is precisely what the *Coven* panel determined to be a collateral matter.

Furthermore, Atilla's "attempt to characterize the [Jail Call] as Rule 613(b) evidence is unconvincing and would amount to an end-run around Rule 608(b)'s bar on extrinsic evidence." *See United States v. McGee*, 408 F.3d 966, 982 (7th Cir. 2005). In *McGee*, the Seventh Circuit rejected the admissibility of a tape recording in which the witness had lied because "[t]he force of the [recording] was not due to a comparison of [the witness's] statements on the tape and his equivocations at trial. Rather, [the witness's] elaborate lie to his supervisor [during the call], in and of itself, cast significant doubt on [the witness's] character for truthfulness." *See id.* (citing *United States v. Winchenbach*, 197 F.3d 548, 558 (1st Cir. 1999)). Atilla advances much the same argument as that rejected in *McGee*. The purported value of the Jail Call derives not from a side-by-side comparison of Zarrab's trial testimony to his statements in the recording, but rather from the recording in and of itself—which Atilla argues shows a character for untruthfulness (*i.e.*, Zarrab's purported

bias). This Court should follow *McGee* and reject Atilla's argument.

Atilla also advances for the first time on appeal a new theory of admissibility: that the Jail Call and Transcript are evidence of Zarrab's bias in favor of the Government. (*See* Br. 68). Because Atilla did not raise this argument below, plain error review applies. Here there was no error, let alone plain error. In light of this Court's holding in *Coven*, Atilla's new theory is also without merit. *See* 662 F.2d at 170-71 (rejecting argument that cross-examination was "relevant to [the cooperating witness's] state of mind or motivation when signing the agreement and, therefore, to his bias," because it was "a collateral matter going only to [his] general credibility"). Furthermore, the Jail Call was particularly unlikely to demonstrate Zarrab's bias or lack of credibility, because it occurred more than a year before Zarrab pleaded guilty pursuant to a cooperation agreement. Thus, Judge Berman did not abuse his discretion by excluding the Jail Call and the Transcript.

Finally, any error in the evidentiary ruling was harmless. Defense counsel conducted a two-and-a-half day cross-examination of Zarrab about numerous matters in an effort to attack his credibility, including his participation in the offense conduct, his payment of numerous bribes, his participation in the creation of false and forged documents, false exculpatory statements to law enforcement, and other examples of his prior untruthfulness. Through cross-examination, Atilla's counsel also explored whether Zarrab's cooper-

ation agreement with the Government provided an incentive to give false testimony. Counsel elicited testimony that Zarrab viewed cooperation as the fastest way to leave prison, that Zarrab understood that any reduction in his sentence based on his cooperation would come as a result of a motion pursuant to United States Sentencing Guideline 5K1.1, and that it was the Government that decided whether Zarrab had supplied substantial assistance so as to warrant such a motion. In other words, the jury was well aware what Zarrab hoped to receive a lenient sentence as a result of testifying and wanted the Government to view him as having provided substantial assistance. When taken together, it is clear that, even without the Jail Call, "the jury was already in possession of sufficient information to make a discriminating appraisal of the particular witness's possible motives for testifying falsely in favor of the government." *United States v. Singh*, 628 F.2d 758, 763 (2d Cir. 1980).

Furthermore, even if the Jail Call had been admitted, it would have had no effect on the jury's verdict in light of the powerful evidence of Atilla's guilt. Zarrab's testimony was corroborated on critical points by independent evidence, all of which contributed to an overwhelming case of Atilla's guilt. For example, Zarrab's testimony about the October 2012 meeting was corroborated by contemporaneous recorded communications in which Zarrab described the aspects of the scheme discussed at the meeting and the fact that Atilla was part of those discussions. Similarly, Zarrab's description of Atilla's participation in designing the fake food scheme was corroborated by electronic communications he had with Aslan in which Aslan and Zarrab

discussed "the method proposed by Hakan Atilla," as well as by other wiretapped conversations, including ones in which Atilla himself discussed the scheme. These contemporaneous communications occurred long before Zarrab had any alleged incentive to fabricate testimony, and were themselves further corroborated by documentary evidence and bank records as described above.

Accordingly, the District Court did not abuse its discretion in denying admission of the Jail Call and Transcript, and any error was harmless.

CONCLUSION

The judgment of conviction should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 16,934 words in this brief.

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